

**OPEN RECORDS AND MEETINGS OPINION
2002-O-01**

DATE ISSUED: January 10, 2002

ISSUED TO: Wade Enget, Tioga City Attorney

CITIZEN'S REQUEST FOR OPINION

On December 12, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steve Andrist on behalf of the Tioga Tribune asking whether the Tioga City Commission violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session on December 3, 2001, that was not authorized by law or held in compliance with required procedures.

FACTS PRESENTED

The Tioga City Commission (City) held an executive session during its meeting on December 3, 2001. Prior to holding the executive session, the person presiding over the meeting announced: "At this time, I think we'll recess into executive session compliant with Century Code 44-04-19.1 in the matter of Officer Rudnick." Meeting of Tioga City Commission (Dec. 3, 2001). No other description of the topic of the executive session or the legal authority for the session was provided by the City during the open portion of the meeting.

The executive session began at 7:34 PM and was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5). At the conclusion of the executive session, the City reconvened in open session at 7:50 PM and passed a motion to terminate Officer Rudnick's employment effective December 10, 2001. The recording of the executive session has been reviewed by this office.

ISSUES

1. Whether the Tioga City Commission violated the procedural requirements for holding an executive session in N.D.C.C. § 44-04-19.2 by failing to vote on whether to hold the executive session on December 3 and by failing to announce the legal authority and topic to be considered during the executive session.

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2. Whether the executive session of the Tioga City Commission on December 3 was authorized by law and limited to topics for which an executive session may be held.

ANALYSES

Issue One:

Before holding a lawfully authorized executive session, a governing body must comply with the procedural requirements in N.D.C.C. § 44-04-19.2. One requirement in that section is that a governing body must vote on whether to close a portion of its meeting to the public, unless a meeting is required to be closed. N.D.C.C. § 44-04-19.2(2)(a). Another requirement is that, prior to holding an executive session, the governing body must “announce the topics to be discussed or considered during the executive session and the body’s legal authority for holding an executive session on those topics.” N.D.C.C. § 44-04-19.2(2)(b).

The purpose of the announcement required in N.D.C.C. § 44-04-19.2(2)(b) is to “provide the public with a legally sufficient reason for holding the executive session.” 2000 N.D. Op. Att’y Gen. O-10. In response to the opinion request, the City indicated it was relying on the attorney consultation provision in N.D.C.C. § 44-04-19.1(2) as the legal authority for its executive session on December 3.

When an executive session is held for “attorney consultation” under N.D.C.C. § 44-04-19.1, an announcement is sufficient if it indicates that the reason for the executive session is 1) attorney consultation 2) regarding reasonably predictable or pending litigation or adversarial administrative proceedings and 3) further indicates the topic of the executive session by announcing the names of the other parties to the litigation or proceeding, the purpose of the executive session, or other information about the topic of the executive session that does not reveal closed or confidential information.”

2001 N.D. Op. Att’y Gen. O-15.

In this case, the reference in the announcement to “Century Code 44-04-19.1 in the matter of Officer Rudnick” adequately identifies the topic of the executive session, but could refer either to the executive session for attorney consultation authorized in subsection 2 of N.D.C.C. § 44-04-19.1 or to the executive session for contract negotiation strategy authorized in subsection 7 of that section. Since N.D.C.C. § 44-04-19.1 authorizes multiple reasons for holding an executive session, each of which require further description by the City, the City’s announcement needed to provide more information about the legal

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authority for the executive session. See 1999 N.D. Op. Att’y Gen. O-04. In addition, the City did not vote on whether to hold its executive session.

It is my opinion the City violated N.D.C.C. § 44-04-19.2 by failing to vote on whether to close a portion of its meeting and by failing to sufficiently announce the legal authority for its executive session on December 3, 2001.

Issue Two:

As discussed earlier in this opinion, the City relies on the attorney consultation provision in N.D.C.C. § 44-04-19.1(2) as the legal authority for its executive session on December 3. The recording of the executive session indicates that the City’s attorney and Officer Rudnick attended and participated in the discussion during the executive session.

Section 44-04-19.1, N.D.C.C., was first enacted as a result of a bill introduced in 1989 at the request of the Attorney General. See 1989 N.D. Sess. Laws ch. 545, § 1; S.B. 2331, 1989 N.D. Leg. The written testimony submitted on behalf of the Office of Attorney General regarding S.B. 2331 indicates the goal of the open records and meetings exceptions in N.D.C.C. § 44-04-19.1 “is not to hide from the public the manner in which its business is being conducted. Instead, the goal is to allow a public agency to conduct an adversarial proceeding without having the adverse party know of the agency’s strategy or legal work.” Hearing on S.B. 2331 Before the House Comm. on the Judiciary 1989 N.D. Leg. (Mar. 15) (Written testimony of Assistant Attorney General Terry Adkins). The purpose of N.D.C.C. § 44-04-19.1 is not to prevent public access to attorney work product or attorney consultation. However, as a practical matter, to effectively conceal a public entity’s attorney work product or attorney consultations from its adversary in a pending or reasonably predictable lawsuit or adversarial administrative proceeding, that information must be concealed from the public as well.

Section 44-04-19.1, N.D.C.C., was amended in 1997 to include the following statement: “Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.” 1997 N.D. Sess. Laws ch. 381, § 15. N.D.C.C. § 44-04-19.1(2) does not authorize an executive session any time a governing body receives its attorney’s advice. The Office of Attorney General has previously indicated that the line between a routine conversation with its attorney and “attorney consultation” under N.D.C.C. § 44-04-19.1 is “drawn at the point where the public entity’s bargaining or litigation position would be adversely affected if the discussion occurred in an open meeting.” 1999 N.D. Op. Att’y Gen. O-04. The opinion provided an example in a footnote:

[T]here would be no adverse affect, and the “attorney consultation” exception would not support closing a meeting, if a governing body meets with the other

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side to the pending or reasonably predictable litigation or administrative proceeding.

Id. at n.1. This example is similar to the situation presented in this opinion.

The recording of the December 3 executive session reveals an amicable negotiation between the City and Officer Rudnick. The executive session began with the City connecting its attorney to the meeting by speakerphone. Officer Rudnick joined the meeting at that point and attended the entire executive session.

An executive session for attorney consultation is a “closed meeting” and, as a general rule, the governing body may allow any person to attend whose presence is necessary to “carry out or further the purposes of a closed meeting.” N.D.C.C. § 44-04-17.1(1). See also 1999 N.D. Op. Att’y Gen. O-01. However, a public entity essentially waives its right to invoke the exceptions to the open records and meetings laws in N.D.C.C. § 44-04-19.1 for attorney work product or attorney consultation if the public entity allows its adversary to review the work product or attend the consultation.

The executive session in this instance was held to enable the City to receive its attorney’s advice regarding a reasonably predictable lawsuit involving the City and Officer Rudnick as adversaries. However, because Officer Rudnick was allowed to attend the attorney consultation between the City and its attorney, it is my opinion the City’s litigation position with regard to Officer Rudnick would not have been adversely affected by holding its discussion in an open meeting. As a result, the executive session on December 3 was not authorized, with one narrow exception discussed below.

Records of a public employee’s medical treatment are confidential. N.D.C.C. § 44-04-18.1(1). During the executive session, a city commissioner made a one-word reference to a fact derived from a confidential medical treatment record of Officer Rudnick. Although the remainder of the discussion should have occurred in an open meeting, any release of information contained in the confidential record was required to be made during an executive session. See N.D.C.C. § 44-04-19.2(1) (executive session authorized to discuss confidential record). Accordingly, although the City did not announce or rely on N.D.C.C. §§ 44-04-18.1(1) and 44-04-19.2(1) as legal authority for its executive session, the reference was required to occur in an executive session and must be excised from the recording of the executive session before the City releases the recording to the public.

CONCLUSIONS

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1. The Tioga City Commission violated N.D.C.C. § 44-04-19.2 by failing to vote on whether to close a portion of its meeting and by failing to accurately announce the legal authority for its executive session on December 3, 2001.
2. With the exception of a brief, one-word reference to a confidential medical treatment record of the officer who is the subject of the meeting, the executive session of the Tioga City Commission on December 3, 2001, was not authorized by law and therefore violated N.D.C.C. § 44-04-19.

STEPS NEEDED TO REMEDY VIOLATIONS

The City's failure to sufficiently announce the legal authority for its December 3 executive session is remedied by the summary of the City's position in this opinion. The executive session was held without objection by any of the commissioners who were present at the meeting. Therefore, the commissioners are deemed to have agreed to the executive session and no further remedial action is necessary.

The City must disclose the recording of the executive session except for the one-word reference to the confidential medical record, which has been identified to the City's attorney by this office.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. *Id.*

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